

GUIDELINES FOR EXAMINATION
EUROPEAN UNION
INTELLECTUAL PROPERTY OFFICE
(EUIPO)

Part A

General rules

Section 10 Evidence

Obsolete

1 Introduction

Articles [96](#) and [97](#) EUTMR

Articles [49 to 55](#) EUTMDR

Articles 64 and 65 CDR

Articles 42 to 46 CDIR

Common Communication on the Common Practice on Criteria for Assessing Disclosure of Designs on the internet published on 1 April 2020 ([CP10](#))

Common Communication on the Common Practice on Evidence in Trade Mark Appeal Proceedings: Filing, Structure and Presentation of Evidence, and the Treatment of Confidential Evidence on 31 March 2021 ([CP12](#))

This section of the Guidelines deals with the general provisions on the means of evidence for all proceedings before the Office. The principle that prevails in EU law is that of the ‘unfettered evaluation of evidence’. This means that the **only relevant criterion** for the purpose of assessing the probative value of evidence lawfully adduced **relates to its credibility** (13/05/2020, [T-288/19](#), IPANEMA (fig.) / iPANEMA (fig.) et al., EU:T:2020:201, § 41).

Establishing the credibility or probative value of evidence is fundamental in proceedings before the Office. This part of the Guidelines aims to assist parties in understanding how the probative value of evidence can be enhanced and what to avoid when adducing evidence.

According to [Article 97 EUTMR](#), [Article 51 EUTMDR](#), Article 65 CDR and Article 43 CDIR, the **means of giving and obtaining evidence** in all proceedings before the Office include:

- hearing the parties;
- requests for information;
- producing documents and items of evidence;
- hearing witnesses;
- expert opinions;
- sworn or affirmed statements in writing or statements having a similar effect under the law of the State in which they are drawn up;
- inspection *in situ* by the Office.

The most frequently used means of evidence is the submission of documents and items. In accordance with [CP10](#) and [CP12](#), the Office accepts, for example, the following:

- invoices and other commercial documents;
- catalogues, advertisements and marketing campaigns;

- publications;
- samples;
- official and public documents;
- witness statements;
- sworn or affirmed statements (affidavits);
- market surveys
- extracts from social media.

Different types of evidence may be submitted to establish the same fact or requirement and the parties are free to choose the means of evidence they submit (26/06/2019, [T-651/18](#), HAWKERS (fig.) / HAWKERS (fig.) et al., EU: T:2019:444, § 35). To assess the probative value of a document, it is particularly necessary to consider from whom it originates, the circumstances in which it came to be, the person to whom it is addressed and whether the document appears sound and reliable (06/11/2014, [T-463/12](#), MB, EU:T:2014:935, § 53).

For information on specific aspects of the various proceedings, the rules in the relevant sections of these Guidelines should be consulted. The following table contains **examples** of claims to be proved relating to trade marks or designs.

Table 1: EUTM proceedings

Claim	Aim of evidence	Cross reference
Descriptive mark	To demonstrate that a trade mark consists/does not consist exclusively of signs or indications that may serve, in trade, to designate the kind, quality, quantity, intended purpose, value, geographical origin, or the time of production of the goods or of rendering of the service, or other characteristics of the goods or services for which registration is sought or the trade mark is registered, in the relevant territory.	Part B, Examination, Section 4, Absolute grounds for refusal, Chapter 4, Descriptive trade marks (Article 7(1)(c) EUTMR) Part D, Cancellation, Section 2, Substantive provisions, 3 Absolute Grounds for Invalidity

Non-distinctive mark	To demonstrate that the trade mark is/is not devoid of any distinctive character. Such distinctiveness can be assessed only by reference, first, to the goods or services for which registration is sought or the trade mark is registered and, second, to the relevant public's perception of that sign, in the relevant territory.	Part B, Examination, Section 4, Absolute grounds for refusal, Chapter 3, Non-distinctive trade marks (Article 7(1)(b) EUTMR) Part D, Cancellation, Section 2, Substantive provisions, 3 Absolute Grounds for Invalidity
Acquired distinctiveness	To demonstrate that a mark has acquired a distinctive character in the relevant geographical area regarding the goods or services for which registration is requested or for which the mark is registered, following the use which has been made of it.	Part B, Examination, Section 4, Absolute grounds for refusal, Chapter 14, Acquired distinctiveness through use (Article 7(3) EUTMR)
Enhanced distinctiveness	To demonstrate that a mark has obtained enhanced distinctiveness, in the relevant geographical area, as a consequence of the use which has been made of it. The evidence of enhanced distinctiveness acquired through use should also refer to the relevant goods and services.	Part C, Opposition, Section 2, Double Identity and likelihood of confusion, Chapter 5, Distinctiveness of the earlier mark, 2 Assessment of Distinctiveness of the earlier mark, 2.3 Examination of enhanced distinctiveness Part C, Opposition, Section 5, Trade Marks with Reputation (Article 8(5) EUTMR), 3 Conditions of application, 3.1 Earlier mark with reputation
Reputation	To demonstrate that a mark is known by a significant part of the public concerned, in the territory in which reputation is claimed, for the relevant goods or services covered by that trade mark.	Part C, Opposition, Section 5, Trade Marks with Reputation (Article 8(5) EUTMR), 3 Conditions of application, 3.1 Earlier mark with reputation

Well-known mark	To demonstrate that a mark is well known in the Member State(s) concerned, in the sense in which the words 'well known' are used in Article 6 <i>bis</i> of the Paris Convention. The mark should be well known in the relevant sector of the public for the particular goods and services.	Part C, Opposition, Section 1, Opposition proceedings, 4.2.4.1 Well-known marks Part C, Opposition, Section 5, Trade Marks with Reputation (Article 8(5) EUTMR), 3 Conditions of application, 3.1 Earlier mark with reputation
Proof of use / genuine use	To demonstrate that within a specific period the proprietor has put the trade mark to genuine use in the Member State(s) in connection with the relevant goods or services in respect of which it is registered. The evidence should consist of indications concerning the place, time, extent and nature of use of the trade mark.	Part C, Opposition, Section 7, Proof of Use

Table 2: RCD proceedings

Claim	Aim of evidence	Cross Reference
Disclosure	To demonstrate that an earlier design that is identical or produces the same overall impression on the informed user as the contested design has been made available to the public before the date of filing of the application for registration or, if a priority is claimed, the date of priority (Article 7 CDR).	Design Guidelines, Examination of design invalidity applications, 5.7.1 Disclosure of earlier design
Features of appearance solely dictated by the technical function of the product	To demonstrate that no consideration other than the technical function of the design played a role in designing a given feature or all the features of a design (Article 8(1) CDR).	Design Guidelines, Examination of design invalidity applications, 5.5.2.2 Appropriate evidence of functionality

2 How to submit evidence

2.1 General requirements and recommendations

According to [Article 55\(2\) EUTMDR](#) on the examination of **written evidence in EUTM proceedings**, any documents or other items of evidence must be contained in an annex to the submission. The submission must also include an index detailing the evidence in the annexes, namely:

- the number of the annex where the item is contained,
- a short description of each item of evidence,
- the number of pages of each document or item (if applicable), and
- the page number of the submission where the document or item is mentioned.

The following is an example of an admissible **index**:

Annex No.	Description	Pages	Page where the evidence is mentioned
Annex 1	Survey 2021	1 - 30	Observations, page 1
Annex 2	Catalogues 2022	31 - 45	Observations, page 5

The annexes must be numbered consecutively and in accordance with the index. The annexes themselves should be named on their first page and have page numbers that continue from one annex to the next. The submission must refer to the number of the annex in accordance with the index (e.g. Annex 1) when it is mentioned in the text.

As regards evidence on **data carriers**, technical specifications are established in Decision [No EX-22-7](#) of the Executive Director of the Office of 29 November 2022 on technical specifications for annexes submitted on data carriers (for further information see the Guidelines, [Part A, General rules, Section 1, Means of communication, time limits, paragraph 3.1.4, Data carriers](#)).

Best Practice: in the interests of the parties, the Office and higher instances, the Office recommends the following approach when structuring evidence and submissions to facilitate the processing and handling of the files:

1. the parties should limit their submissions strictly to items of evidence that are relevant to the case and to the ground/argument in question and avoid extraneous or superfluous materials;
2. if documentation is sent in separate batches, each batch should be numbered, have page numbers and show the total number of pages in each batch;
3. even if annexes are submitted at different times in the same proceedings, they should be numbered consecutively to avoid confusion due to repetition of numbering;

4. photographs should be submitted instead of physical specimens (e.g. containers, packaging, etc.) unless the relevant features cannot be reproduced visually;
5. no original documents or items should be sent by mail as the Office will not return any originals but keep them on file ([Article 115 EUTMR](#), Article 76 CDR);
6. to facilitate scanning, items sent by mail must not be stapled, bound or placed in folders and where items must be sent in duplicate for forwarding to the other party, they should be clearly identified as such;
7. if several trade marks, goods and services or dates are displayed in a single item of evidence, the submission should clearly indicate which is the relevant information for the proceedings in question;
8. if colour is of relevance to the proceedings, the evidence should be submitted in colour (for example, a registration certificate for a mark in colour or evidence of genuine use);
9. if the case involves a range of different earlier marks, grounds, multiple classes, or long lists of goods and services, the party should explain in its submission which issue each item of the evidence supports (e.g. Annexes A-D concern proof of use of the earlier mark 1 for Class 25, or for goods falling under the broad category of clothing in Class 25, Annexes E-F show reputation/well-known character/enhanced distinctiveness of earlier mark 2 for Class 25, Annex G concerns proof of use of earlier mark 3 for the retail sale of clothing in Class 35).

There are no specific legal provisions regarding the format of documents or items of evidence for **RCD proceedings** although the technical specifications established for data carriers in Decision [No Ex-22-7](#) also apply. In any event, the information mentioned above is also recommended for evidence provided in RCD proceedings (see the Guidelines on the Examination of design invalidity applications, paragraph 3.10.2, Facts, evidence and arguments).

2.1.1 Deficiencies

A **deficiency** in **EUTM proceedings** may be raised according to [Article 55\(3\) EUTMDR](#) when:

1. no clear index can be identified;
2. the index does not indicate the number of annexes, a description of each item of evidence or the page number of the submission where the item of evidence is mentioned; or
3. the evidence is not structured in consecutively numbered annexes and/or these are not structured in accordance with the index.

Furthermore, a document or item may not be taken into account where the Office cannot clearly establish to which ground or argument it relates. The relevant decision of the Office will identify items of evidence not taken into account for failing to comply with [Article 55 EUTMDR](#).

For annexes submitted on data carriers, even if the annex complies with the technical specifications of Articles 3 and 4 of Decision [No EX-22-7](#) a deficiency may be raised if the material is illegible.

If a corrected annex is not resubmitted, the original annex is deemed not to have been submitted (see Articles 5 and 6(b) of that decision; for further information on data carriers, see the Guidelines, [Part A, General rules, Section 1, Means of communication, time limits, paragraph 3.1.4, Data carriers](#)).

2.2 Specific requirement in inter partes proceedings

In *inter partes* proceedings, where a communication with annexes is submitted **by post or courier**, the party must submit as many copies of the annexes as there are parties to the proceedings ([Article 64 EUTMDR](#)). This also applies to design proceedings (see Examination of design invalidity applications, 3.1 Form of the application).

The Office, however, does not require duplicates when the annexes submitted by post or courier consist of paper documents (such as loose sheets of evidence) that are smaller than or equal to A3 size. This is because these documents are scanned into the electronic file and transmitted to the other party by electronic means of communication. In exceptional cases where the other party is not a user of electronic communication, the Office will produce a paper copy or a copy on a data carrier and forward it by post or courier.

Annexes submitted by post or courier must, however, be submitted in duplicate when:

- the annex consists of **paper documents larger than A3 size**; or
- the annex does **not consist of paper** (e.g. physical items of evidence such as product samples). This also includes evidence on **data carriers** because, although the content of the data carrier is uploaded into the electronic file, a copy is nevertheless required as a safeguard (for further information on data carriers, see the Guidelines, [Part A, General rules, Section 1, Means of communication, time limits, paragraph 3.1.4 Data carriers](#)).

Annexes submitted by **electronic means** do not require duplicates (for further information on the technical requirements for communication by electronic means, see the Guidelines, [Part A, General rules, Section 1, Means of communication, time limits, paragraph 3.1.1 \[Communications...\] via the User Area \(electronic means\)](#)).

In *inter partes* proceedings relating to **EUTMs**, where duplicate annexes are required but not provided, the annexes in question will not be considered.

However, in *inter partes* proceedings relating to **RCDs**, the Invalidity Division may invite the party to file a missing duplicate within a specified deadline.

The Office will base its decision only on evidence on which both sides have had an opportunity to submit observations. Therefore, evidence submitted properly will be communicated to the other party and the Office may set a time limit to reply.

2.3 Confidentiality

A party may request, when submitting a document or at a later stage, that all or part of it be kept confidential (as long as no request for an inspection of files is pending). For further information on confidentiality of documents submitted, see the Guidelines:

Time limits	Part A, General rules, Section 1, Means of communication, time limits, paragraph 3.1.6 Confidentiality
Inspection of files	Part E, Register operations, Section 5 Inspection of files, 5.3.1 Parts of the file for which the party concerned expressed a special interest in keeping confidential

3 References to other proceedings

[Article 115\(3\) EUTMR](#)

[Article 64\(2\) EUTMDR](#)

Article 76 CDIR

Decision [No EX-23-12](#) of the Executive Director of the Office of 15 December 2023 on the keeping of files and the inspection of files

Decision [No EX-22-7](#) of the Executive Director of the Office of 29 November 2022 on technical specifications for annexes submitted on data carriers

3.1 Reference to documents or evidence in other proceedings before the Office

Parties may incorporate evidence into proceedings before the Office by referring to documents or evidence submitted in **other proceedings**.

Such references are acceptable when the party clearly identifies the documents referred to. They must indicate the following:

1. the type and, where applicable, number of the proceedings (e.g. opposition, cancellation proceedings, appeal, transfers etc.);
2. the title of the document and, where relevant, the number of the Annex where the document was contained;

3. the number of pages in the document; and
4. the date the document was sent to the Office.

Example of an acceptable reference: ‘the statutory declaration that was submitted to the Office on 12/12/2020 as Annex I in opposition proceedings B 123 456, together with exhibits 1 to 8, consisting of 200 pages’.

Best practice: References to submissions and evidence in other cases should be made via **a separate document or separate section at the beginning of the observations**. This ensures visibility and prevents proceedings being unnecessarily delayed. If this recommendation is not followed, the party risks the reference being overlooked. This may lead to reopening and delaying the proceedings.

When the party only makes a general reference to documents or evidence submitted in other proceedings, the Office will invite the party to provide a clear and precise indication of the documents or evidence referred to within a given time limit. If this is not done, the general reference **will not be taken into account**.

A party may refer to all or some of the annexes provided previously on a data carrier, but they must also submit a copy of the annexes with the same content on a data carrier that complies with the **current** technical specifications, as detailed in Decision [No EX-22-7](#).

Material submitted in other proceedings that was not kept in an electronic format may have been destroyed according to [Article 115\(3\) EUTMR](#) and Decision [No EX-23-12](#). In this case, the party referring to such evidence will be invited to submit the previous evidence again with duplicates if necessary (see the Guidelines, [Part A, General rules, Section 10, Evidence, paragraph 2.2, Specific requirement in *inter partes* proceedings](#)). If this evidence is resubmitted on a data carrier, it must comply with Decision [No EX-22-7](#). Where the evidence is resubmitted via the User Area, Decision [No EX-23-13](#) of the Executive Director of the Office of 15 December 2023 on communication by electronic means should be followed.

If reference is made to a procedure in a different language, a translation may be necessary if the content of the evidence is not self-explanatory (for further information on the translation of evidence in *inter partes* proceedings, see the Guidelines, [Part C, Opposition, Section 1, Opposition proceedings, paragraph 4.3.3, Translation of supporting documents other than observations](#) and the Design Guidelines, Examination of design invalidity applications, 3.10.2 Facts, evidence and arguments).

3.2 References to national office and court decisions, and decisions of the Office

Parties may refer to findings in previous decisions of national offices and courts, or to previous Office decisions.

When a party refers to **national office or court decisions**, the Office is not bound by those decisions. Nevertheless, national courts have a thorough knowledge of the specific characteristics of their Member State, in particular, the marketplace reality in

which goods and services are marketed and the customer perception of signs, and this may be relevant for the assessment made by the Office. Maximising the relevance of these decisions before the Office will require sufficient information, in particular, about the facts and evidence on which the decision was based as well as an explanation as to why the party believes the national decision is relevant to the outcome of the case.

When the party refers to **decisions of the Office (EUIPO)**, it should explain in detail why it believes that the cases are comparable and how the previous decision may influence the outcome (e.g. same legal issue, same or comparable signs, same parties). In any event, the Office is not bound to come to the same conclusion as in its previous decision. It must examine each case on its own merits. Regarding the obligations to state reasons, see the Guidelines, [Part A, General rules, Section 2, General principles to be respected in the proceedings, paragraph 1, Adequate reasoning](#)). For additional information on references to national decisions or decisions of the Office, see:

General principles of EU Law	Part A, General rules, Section 2, General principles to be respected in the proceedings, paragraph 3, Other general principles of EU law
Acquired distinctiveness	Part B, Examination, Section 4, Absolute grounds for refusal, Chapter 14 Acquired distinctiveness through use (Article 7(3) EUTMR), paragraph 8.1.5, Prior registrations and acquired distinctiveness
Likelihood of confusion	Part C, Opposition, Section 2, Double identity and likelihood of confusion, Chapter 6, Other factors, paragraph 5, Prior decisions by EU or national authorities involving conflicts between the same (or similar) trade marks
Reputation	Part C, Opposition, Section 5, Trade marks with reputation (Article 8(5) EUTMR), paragraph 3.1.4.4, Means of evidence

4 Specific means of evidence

4.1 Online evidence

Considering the development of information technologies and the growing importance of e-commerce, social media and other online platforms in business, evidence originating from the internet is accepted as a valid means of evidence.

Where internet evidence is submitted in EUTM proceedings, most claims require the party to show online interaction rather than mere internet presence. This can be done by providing data related to the geographic distribution of website visitors, pages viewed during website visits, duration of website visits and completed transactions.

Mere reference to a website

The nature of the internet can make it difficult to establish the content available there and the date or period this content was made available to the public because:

- not all web pages mention when they were published;
- when updated, they do not provide an archive of the material previously displayed or a record that accurately indicates what was published on a given date;
- web pages may be live when evidence is submitted but disabled at a later date when the Office needs to refer to them.

Therefore, a mere reference to a website (even if by a direct hyperlink) **is not valid**. However, the Office accepts a reference to a database recognised by the Office for substantiation purposes in inter-partes trade mark proceedings (see [Part C, Opposition, Section 1, Opposition proceedings, 4.2 Substantiation](#)).

Date of the online evidence

The **date of the information** is to be shown, for example, when it was posted on social media or when the evidence was printed.

The Office can establish the date of the evidence from the internet if:

- the website provides time-stamp information relating to the history of modifications applied to a file or web page (as available for Wikipedia or as automatically appended to content, e.g. forum messages and blogs);
- a web page screenshot bears a given date (20/10/2021, [T-823/19](#), Bobby pins, EU:T:2021:718, § 26, 32 and 42); or
- information relating to a web page's updates is available from an internet archiving service, such as the Wayback Machine (19/11/2014, [T-344/13](#), FUNNY BANDS / FUNNY BANDS, EU:T:2014:974), but it is recommended that archive printouts are corroborated by other evidence from alternative sources.

Example:

Case No	Comment
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<p>19/10/2022, T-275/21, DEVICE OF A CHEQUERBOARD PATTERN (fig), EU:T:2022:654, § 80 and 82-84</p>	<p>Evidence of the presence and promotion of a brand on the internet may play a role in assessing distinctive character acquired through use of a trade mark. In that case, the proprietor of the mark at issue must demonstrate that the relevant websites and, in particular, the web pages on which that mark was displayed, promoted or marketed, target or are consulted by a significant part of the relevant public in the Member States in which the mark is, <i>ab initio</i>, devoid of inherent distinctiveness.</p> <p>To prove the intensity of use of the trade mark on the websites in question, the mark's proprietor must demonstrate, for example, by submitting a traffic analysis report for that website during the relevant period, that a significant number of internet users in the Member State concerned, consulted or interacted with the content of the website in question. For instance, data relating to the number of visits to that website, comments or other forms of web user interactions in the Member State may be taken into consideration.</p> <p>In addition, evidence showing that search engine and social network algorithms display non-sponsored search results which, for search terms describing the trade mark at issue, systematically return the trade mark proprietor's goods, may also be relevant.</p> <p>On the other hand, the mere fact that a website on which the mark at issue was promoted is accessible in certain Member States is not sufficient to demonstrate that a significant part of the relevant public in those Member States has been exposed to that mark.</p>
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4.1.1 Printouts from websites

In principle, extracts from **editable websites**, such as the online encyclopedia Wikipedia or similar sources, cannot be considered to be probative on their own. This is because their content may be amended at any time and, in certain cases, by any visitor, even anonymously (23/09/2020, [T-738/19](#), Wi-Fi Powered by The Cloud (fig.), EU:T:2020:441, § 38-39; 16/10/2018, [T-548/17](#), ANOKHI (fig.) / Kipling (fig.) et al., EU:T:2018:686, § 131, and the case-law cited therein).

Evidence of this kind should be corroborated with information from other sources, such as scientific studies, extracts from technical publications, press articles or statements from professionals, traders and consumers (see 01/02/2023, [T-319/22](#), aquamation, EU:T:2023:30, § 28, and the case law cited therein).

Depending on what must be proven, printouts or screenshots from **non-editable websites** will also need to be supported by corroborating evidence in particular situations. For example, when the evidence's accuracy is contested by the other party, where relevant data is missing, or where evidence is drawn from non-editable websites owned by the interested party or does not seem reliable for other reasons.

However, when the extracts from websites are used to prove the disclosure of designs, they can be sufficient to the extent that they show when the content was published and that it was made publicly available.

4.1.2 Website analytics reports

Website analytics reports showing the website traffic may be a useful way to show that the website has been visited and by whom it has been visited (see 19/10/2022, [T-275/21](#), DEVICE OF A CHEQUERBOARD PATTERN (fig.), EU:T:2022:654, § 80, 82). The analytics reports may contain information such as page views, a page hit, the duration of page visits, and the geographical region of the user. This information may be relevant, for example, when proving genuine use, acquired distinctiveness or reputation.

Examples:

Case No	Comment
14/12/2017, T-304/16 , BET365, EU:T:2017:912, § 66	A high ranking in terms of visitors can help to establish that a mark, which is repeated in the name of the party's website (or otherwise prominently appears on such website), has acquired distinctive character through use in the countries concerned.
19/11/2014, T-344/13 , FUNNY BANDS / FUNNY BANDS, EU:T:2014:974, § 29	The intensity of the alleged use of the rights relied on may be shown by, inter alia, a certain number of visits to the site, the emails received via the site or the volume of business generated.

4.1.3 Social media

Social media is understood as websites and applications that facilitate social networking. Evidence from social media can be used to show the relevant public's recognition of the mark or its use or to show the disclosure of a design.

Social media may be an independent source of evidence for information created by the platforms themselves (e.g. the account's date of creation or information on the modification of the account/page name), which cannot be controlled or altered by the owner of a page/account (24/10/2017, [T-202/16](#), coffee inn (fig.) / coffee in (fig.) et al., EU:T:2017:750, § 51).

Content created by users can be changed, however, and it is recommended to:

- submit a printout or a screenshot;
- ensure that the evidence makes reference to the relevant trade mark and goods and services, or that it displays a clear image of the design and indicates the relevant date and disclosure source;
- ensure that the post's publication date and URL address is shown;
- include file analytic reports (see [paragraph 4.1.2](#)); and
- provide information on the purpose and the social media website's main characteristics.

Regarding references to influencer marketing, it is recommended to submit:

- information on the influencer and followers (e.g. the geographical location of the influencer/followers and related advertising expenditure); or
- the results of a followers campaign (e.g. the sales volume on a country-by-country basis made via a dedicated influencer URL address or code).

For online advertising, see [paragraph 4.8.1](#).

4.2 Affidavits

Overview

Statements in writing sworn, affirmed or having a similar effect under the law of the Member State in which the statement is drawn up (affidavits) are valid means of evidence ([Article 97\(1\)\(f\) EUTMR](#), Article 65(1)(f) CDR).

Before the Office, their evidential value is assessed in light of EU law, not the laws of a Member State (28/03/2012, [T-214/08](#), Outburst, EU:T:2012:161, § 33; 09/12/2014, [T-278/12](#), PROFLEX, EU:T:2014:1045, § 53).

The Office will assess the probative value of the information the affidavit contains, together with any other supporting evidence, considering:

- the document's origin, including the capacity of the person giving the evidence (see [paragraphs 4.2.1](#) and [4.2.2](#));
- the circumstances of its preparation;
- to whom it is addressed;
- whether the content makes sense and seems reliable; and
- the relevance of the contents of the statement to the particular case.

(07/06/2005, [T-303/03](#), Salvita, EU:T:2005:200, § 42; 09/12/2014, [T-278/12](#), PROFLEX, EU:T:2014:1045, § 50; 18/11/2015, [T-813/14](#), Cases for portable computers, EU:T:2015:868, § 26).

Affidavits containing detailed and specific information and that are supported by other evidence have a higher probative value than general and abstract statements.

The Office makes a distinction between affidavits coming from the party or the sphere of influence of the party (e.g. employees) and affidavits from an independent source. That said, an affidavit must be considered under the circumstances of the particular case and its reliability cannot be automatically denied, even if drawn up by the interested parties or their employees (16/12/2020, [T-3/20](#), Canoleum / Marmoleum, EU:T:2020:606, § 51-52; 28/03/2012, [T-214/08](#), Outburst, EU:T:2012:161, § 30; 05/10/2022, [T-429/21](#), ALDIANO, EU:T:2022:601, §52).

The fact that affidavits from different sources are made according to a **predetermined draft provided by the interested party** does not in itself affect their probative value (16/09/2013, [T-200/10](#), Avery Dennison, EU:T:2013:467, § 73).

The relevance of the contents of the affidavit to the particular case contributes to its probative value. For example, the affidavit will be less effective if it only generally refers to 'the trade marks of the party' instead of to the specific mark(s) in question (see for acquired distinctiveness 13/09/2012, [T-72/11](#), Espetec, EU:T:2012:424, § 83-84; 04/05/1999, [C-108/97](#) & [C-109/97](#), Chiemsee, EU:C:1999:230).

4.2.1 Affidavits by the party or its employees

Affidavits coming from the sphere of the interested party are generally given less weight because the perception of a party involved in the case may be affected by personal interests in the matter.

Consequently, this evidence must be treated as indicative and should be corroborated by other evidence (21/11/2012, [T-338/11](#), PHOTOS.COM, EU:T:2012:614, § 51; 28/05/2020, [T-615/18](#), D (fig.) / D (fig.) et al., EU:T:2020:223, § 61; 09/12/2014, [T-278/12](#), PROFLEX, EU:T:2014:1045, § 51; 18/11/2015, [T-813/14](#), Cases for portable computers, EU:T:2015:868, § 29).

An assessment should be made, therefore, of whether the content of the affidavit is sufficiently supported by the other evidence (or vice versa).

4.2.2 Affidavits made by third parties

Affidavits from **independent third parties** have more probative value than those from entities that have links with the interested party (19/01/2011, [R 1595/2008-2](#), FINCONSUM ESTABLECIMIENTO FINANCIERO DE CREDITO / FINCONSUMO (fig.), § 31).

Evidence from suppliers or distributors of the party concerned generally have less weight, but their degree of independence of the latter will heavily influence the probative value (28/10/2009, [T-137/08](#), Green/Yellow, EU:T:2009:417, § 54-56).

Example:

Case No	Comment
19/10/2022, T-275/21 , chequerboard pattern (fig), EU:T:2022:654, § 99	‘It should be recalled that sworn statements, particularly from chambers of commerce and industry, other professional associations or independent bodies, or from public authorities, relating to the relevant public’s perception of a trade mark, constitute “direct” evidence of the acquisition of distinctive character through use, in particular where they emanate from independent sources and their content is sound and reliable (see, to that effect, judgments of 7 June 2005, Lidl Stiftung v OHIM – REWE-Zentral (Salvita), T-303/03 , EU:T:2005:200, paragraph 42; of 28 October 2009, BCS v OHIM – Deere (Combination of the colours green and yellow), T-137/08 , EU:T:2009:417, paragraphs 54 to 56; and of 29 January 2013, Manual tile-cutting machine, T-25/11 , not published, EU:T:2013:40, paragraphs 74 and 75).’

4.3 Opinion polls and market surveys

Opinion polls and market surveys (‘the surveys’) constitute primary evidence to show the recognition of a trade mark among consumers. They are, in particular, used in proceedings concerning acquired distinctiveness, enhanced distinctiveness or reputation of a trade mark.

When assessing the probative value of the surveys, the Office will consider the:

- survey provider;
- target public, the sample size and representation of the results;
- method used, the set of questions, and the circumstances under which the survey was carried out; and
- dates.

4.3.1 Survey provider

The party must submit information that allows the Office to determine the provider’s expertise and impartiality, since these have an impact on the probative value.

The survey provider’s choice is up to the parties but the Office **recommends** using independent research institutes, companies or other independent experts who have

the relevant knowledge and experience to properly understand the survey's purpose, reliably structure and conduct the survey, and to interpret the results.

Example:

Case No	Comment
27/03/2014, R0540/2013-2 , Shape of a bottle (3D) § 49	Serious doubts were cast on the surveys' source, reliability and independent nature owing to the use of the company logo of the well-known GfK company. The surveys did not seem to be carried out by the company, as the applicant argued, but rather by a person who, according to their own declaration, was only 'a former director of GfK'. It was not clear how a former GfK employee could be authorised to use that company's logo on every page of the surveys when they were now 'an independent market research consultant'.

4.3.2 Target public, sample size and representativeness of the results

The target public or sample size must be representative of the entire relevant public and must be selected randomly (29/01/2013, [T-25/11](#), Cortadora de cerámica, EU:T:2013:40, § 88). Therefore, the criteria applied for selecting the sample are decisive for establishing whether it is representative and whether the survey is valid.

The party must submit information that allows the Office to assess whether the sample chosen was representative (09/09/2020, [T-187/19](#), Colour Purple -2587C (col), EU:T:2020:405, § 101). The number and profile (sex, age, occupation and background) of the sample must be submitted, to allow the Office to evaluate whether the results of the survey are representative of the relevant consumers of the goods in question (general public, specific groups of consumers within the general public, or professionals).

A survey will lack probative value where there are no checks on who replied to the questions (21/03/2018, [R 1852/2017-4](#), V V-WHEELS (fig.) / VOLVO (fig.) et al., § 49). In such cases, the real profile of the sample cannot be determined. Additionally, the results of the survey must show whether the percentages reflected in the results correspond to the total number of persons questioned or only to those who replied.

A representative sample does not necessarily require a large number of interviewees. It depends on the type of relevant consumer concerned (01/06/2011, [R 1345/2010-1](#), Fukato Fukato (FIG. MARK) / DEVICE OF A SQUARE (FIG. MARK) et al., § 58). The survey should explain how the sample size was chosen for the relevant consumer. There is a particular danger that small samples may be unreliable for general-use goods that target the general public (09/09/2020, [T-187/19](#), Colour Purple -2587C

(col), EU:T:2020:405, § 100-101). However, small samples could be representative for certain groups of professionals or more specialised goods and services.

Examples:

Case No	Comment
15/03/2011, R 1191/2010-4 , Más Kolombiana...y qué más!! / COLOMBIANA LA NUESTRA (fig), § 23.	A survey was submitted to demonstrate that the earlier sign was well-known to the Spanish public for aerated waters. However, the interviewees were carefully selected on the basis of their origin, that is, Colombians resident in Spain. This is only a very small part of the population living in Spain, and the information was inconclusive.
01/06/2011, R1345/2010-1 , Fukato Fukato (fig.) / DEVICE OF A SQUARE (fig.) et al., § 58.	In principle, samples of 1 000-2 000 interviewees are considered sufficient, provided they are representative of the type of consumer concerned. The opponent's opinion poll was based on a sample of 500 interviewees. It was found insufficient considering the services for which reputation was claimed (among others, scientific and technological services).
09/09/2020, T-187/19 , Colour Purple -2587C (col), EU:T:2020:405, § 100-101.	The patient surveys were only carried out in 10 EU Member States in relation to pharmaceutical preparations and inhalers. Only 50-200 patients were interviewed in each of the Member States. In light of the market shares held by the applicant in each Member State, the numbers of patients interviewed appeared to be much too low to be reliable. The same is true with regard to the professional public, given that less than 0.1 % of general practitioners in the Member States participated in the surveys.

4.3.3 Method used, form of questions and circumstances

The method and circumstances under which the survey was carried out (e.g. face to face, over the phone, on the internet) impact its probative value (12/07/2006, [T-277/04](#), Vitacoat, EU:T:2006:202, § 38).

The probative value of surveys also heavily depends on how the questions are formulated (24/10/2018, [T-261/17](#), SALOSPIR 500 mg (fig.) / Aspirin et al., EU:T:2018:710, § 68). The questions must be formulated correctly in an open and

unassisted manner so they are neutral and representative. They must not lead the participant to a certain answer (13/09/2012, [T-72/11](#), Espetec, EU:T:2012:424, § 79).

The party must submit the complete list of questions included in the questionnaire to allow the Office to determine if open and unassisted questions were used (08/04/2011, [R 0925/2010-2](#), 1 CLEAN! 2 FRESH! 3 STRONG! (fig.) / FRESH & CLEAN et al. § 27). The party must also show how the questions were asked and ordered.

The survey must be carried out in a manner that considers the objective circumstances in which the marks at issue are present, or may be present, on the market (24/10/2018, [T-261/17](#), SALOSPIR 500 mg (fig.) / Aspirin et al., EU:T:2018:710, § 63-64). The aim is to show the target public's spontaneous association or recognition of the mark in question as seen in the examples below.

The probative value of the survey will be lesser where it cannot be ruled out that an unobjective formulation of questions facilitated the association of that mark with a particular undertaking in the minds of those questioned (19/06/2019, [T-307/17](#), DEVICE OF THREE PARALLEL STRIPES (fig.), EU:T:2019:427, § 131) or when the sequencing of the questions leads to unusual speculation on the core issue (02/03/2022, [T-125/21](#), Eurobic/ BANCO BiG BANCO DE INVESTIMENTO GLOBAL (fig.) et al., EU:T:2022:102, § 42-45).

For further guidance on structuring surveys and wording questions, see the Common Practice on Evidence in Trade Mark Appeal Proceedings: Filing, Structure and Presentation of Evidence, and the Treatment of Confidential Evidence ([CP 12](#)) (on pages 36-38). CP12 recommends a three-step test for determining the respondents' ability to spontaneously recognise a test object as coming from one specific commercial source.

Examples:

Case No	Comment
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<p>02/03/2022, T-125/21, Eurobic / BANCO BiG BANCO DE INVESTIMENTO GLOBAL (fig.) et al., EU:T:2022:102, § 42-45.</p>	<p>The interviewees were informed in the earlier questions that the 'Banco Bic' bank had changed its trade mark to 'EuroBic' and, in response to that information, they were asked to choose from among three options. That question and the seven subsequent questions raised, in a leading manner, the question of the link between the trade marks. It is only later in the survey that the interviewees were asked to express their views for the first time on the link between the marks 'Banco BiG' and 'EUROBIC'. It was held that the persons questioned could have been clearly influenced by the eight preceding questions, and by the approach seeking to support, initially, the link between 'EuroBic' and 'Banco BIC' then influence the answers to the questions on comparing the signs 'EUROBIC' and 'BANCO BiG'.</p>
<p>08/04/2011, R 925/2010-2, 1 CLEAN! 2 FRESH! 3 STRONG! (fig.) / FRESH & CLEAN et al., § 27.</p>	<p>This case shows that survey participants' levels of prompted and spontaneous recognition vary. According to the extracts from the 2001 survey in Italy, although the level of 'prompted recognition' stood at 86 %, the rate of 'spontaneous recognition' was only 56 %.</p> <p>This survey failed on other grounds, as there was no indication of the questions put to the target public. This made it impossible to determine whether the questions were genuinely open and unassisted. Further, it failed to state for which goods the trade mark was known.</p>

28/05/2020, T-677/18 , GULLÓN TWINS COOKIE SANDWICH (fig.) / OREO et al., EU:T:2020:229, § 92-93.	The survey used a representation of the three-dimensional biscuit in which the verbal element ‘Oreo’ that usually appears in its centre had been removed. The Court found that the removal of the name for the purpose of the survey was precisely the reason why the results of the survey were more reliable for proving the recognition of the three-dimensional shape. According to the Court, it was appropriate that the survey did not indicate that the three-dimensional shape was a trade mark, precisely to verify whether, when encountering that image, the public identified a specific commercial origin, and therefore identified it as a trade mark.
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4.3.4 Dates

The survey must indicate the period in which it was conducted. This period must be relevant for the proceedings. For example, if the survey intends to show distinctiveness acquired through use at the date of filing of the EUTM application, the probative value is likely to vary depending on the proximity to the relevant filing date or priority date (12/07/2006, [T-277/04](#), Vitacoat, EU:T:2006:202, § 38-39).

4.4 Audits

Audits of a party’s undertaking usually comprise data on financial results, sales volumes, turnover and profits. They may provide useful information about the intensity of a mark’s use. However, such evidence will only be pertinent if it specifically refers to the goods or services traded under the mark in question, rather than to the party’s activities in general.

Audits may be carried out on the initiative of the party itself or be required by company law or financial regulations. In the former case, the same rules as for surveys apply. The status of the entity conducting the audit and the reliability of the applied method will be decisive for determining its credibility. The probative value of official audits and inspections is as a rule much higher, since they are usually conducted by a state authority or recognised body of auditors on the basis of generally accepted standards and rules.

4.5 Annual reports on economic results and company profiles

This type of evidence includes all kinds of internal publications containing information about the history, activities and prospects of the party's company, or more detailed figures about turnover, sales and advertising.

Usually, evidence originating from the party concerned is mainly intended to promote its image. Therefore, the relevant information should be treated with caution, especially if it mainly consists of estimates and subjective evaluations.

However, the probative value may be enhanced where publications are circulated to clients and other interested parties, and contain objectively verifiable information. This is the case, for example, when they have been compiled or revised by independent auditors (as is often the case with annual reports).

4.6 Invoices and other commercial documents

All kinds of commercial documents may be grouped under this heading, such as invoices, order forms, delivery notes, distribution and sponsoring contracts, samples of correspondence with clients, suppliers or associates. Documents of this kind may provide a variety of information on use of a mark (e.g. intensity of use, geographical extent and duration of use). Such evidence can be primary evidence (e.g. to prove that a mark is genuinely used) or secondary evidence (e.g. an indication of the degree of recognition of a mark).

If these documents include sensitive commercial information, the party can either redact specific data in the document or claim confidentiality of the entire document upon a reasoned request (for further information on confidentiality, see the Guidelines, [Part A, General rules, Section 1, Means of communication, Time limits, 3.1.6 Confidentiality](#)).

Invoices are one of the most common means of evidence in EUTM proceedings concerning proof of use (for further information on use of trade marks, see the Guidelines, [Part C, Opposition, Section 7, Proof of use, 6.1 Use as a trade mark](#), and for general considerations on use, see [Part C, Opposition, Section 7, Proof of use](#)).

They must be carefully assessed in conjunction with the evidence as a whole. Invoices must refer to the particulars that are relevant for the proceedings to have probative value (e.g. who issued the invoice, to whom it was addressed, the goods or services, representation of the mark in question and date when they were issued).

Codes used in invoices

The invoices should allow a connection to be made between the sign used on the invoiced goods or services. Invoices may not explicitly list the goods or services or the trade mark representation, but they can allow for these to be deduced by including product numbers or codes. The party must explain such codes and numbers. Cross referencing invoices with catalogues or other depictions of the goods, such as

packaging, can allow a clear link to be made with the sign in question (27/04/2022, [T-181/21](#), SmartThinQ (fig.) / SMARTTHING (fig.), EU:T:2022:247, § 91; 22/03/2023, [T-408/22](#), SEVEN SEVEN 7 (fig.) / Seven, EU:T:2023:157, § 29-31, 33).

These pieces of evidence assessed in combination allow conclusions to be made, such as which goods or services were sold under which trade mark, in what quantities and when.

Best Practice: When submitting invoices as evidence, parties should highlight the goods and services which are relevant for the proceedings to ensure that they can be correctly identified. This is of particular importance when the invoices may include other trade marks or goods and services which are not relevant to the proceedings.

Exemplary character - extrapolating

Invoices relate to individual transactions but the full context must be considered. Although selected invoices will not reflect the entire sales of a company, they can, however, indicate that more sales took place during the relevant period (07/12/2022, [T-747/21](#), Fohlenelf, EU:T:2022:773, § 43). For example, if there are gaps in the sequential numbering of invoices provided, this demonstrates other invoices were emitted that might help in corroborating a party's statements, or other accounting information, as to volumes or continuity of sales.

Addressee

A range of invoices dated in the relevant period helps define the time span and frequency of sales, and together with the addressee information, provides important indications on geographical extent of use. When redacting information, a party must ensure that the addressee information still clearly indicates the relevant territory (whether a country, region or city, etc.).

Company name and trade mark representation

In some invoices there may be clear use of the trade mark in question, while in others a company name may be used or both. For example, where the trade mark is systematically placed in invoice headers as the first element above the company name, use of the sign goes beyond merely identifying the company and refers to the commercial origin of the services provided. The layout of the invoices therefore allows a close connection to be made between the sign and the invoiced services (03/10/2019, [T-666/18](#), ad pepper (fig.), EU:T:2019:720, § 82). The use of a sign as a company name does not exclude its use as a trade mark (26/04/2023, [T-546/21](#), R.T.S. ROCHEM Technical Services (fig.) / ROCHEM MARINE (fig.), EU:T:2023:221, § 61).

4.7 Certifications, rankings and awards

Certifications attesting the quality or other characteristics, rankings and awards granted by public authorities or official institutions – such as chambers of commerce and industry, professional, sporting or cultural associations and societies and consumer organisations – can be used as evidence.

These specialised sources are usually independent of the parties. They attest facts in the course of their official tasks. Therefore, the reliability of such evidence is generally high.

Conversely, prizes and awards offered by unknown entities, or on the basis of unspecified or subjective criteria, should be given less weight.

The probative value also depends on the content of the documents.

Examples:

The fact that the party is a holder of an ISO 9001 quality certificate or a royal warrant does not automatically mean that the sign is known to the public. It only means that the party's goods meet certain quality or technical standards or that it is a supplier to a royal house.

Case No	Comment
25/01/2011, R 0907/2009-2 , O2PLS / O2 et al.	The many brand awards won by the mark were, together with the huge investment in advertising and the number of articles published in different publications, considered an important part of the evidence for reputation (para. 9(iii) and para. 27).
2023/01/18, R 0218/2020-4 , Aalto / Aalto ps et al.	Undoubtedly, the opponent has, according to the evidence submitted, received high rankings and accolades worldwide in relation to its wines. For instance, the 'AALTO PS 2013' wine was ranked among the top 5 <i>grandes pagos de España</i> in 2015 (para. 75). However, the fact the 'AALTO' wines received very positive acclaim by professionals in the field and may even be among the highest quality wines in the world does not necessarily mean that the earlier marks have achieved recognition among a significant part of the ... public (para. 76).

4.8 Promotional materials and publications

4.8.1 Catalogues, advertisements and marketing campaigns

A party may submit promotional materials, including:

- price lists and offers;
- advertising reach and spend;
- material related to online shops;

- promotions on company websites;
- website archives;
- television spots and video/audio files;
- business correspondence and business cards; and
- materials from fairs and conferences.

Advertising material often supports facts indicated by other items of evidence.

It is important to have indications on the impact of the advertising. This may be shown by reference to the amount of promotional expenditure, the nature of the promotional strategy, and the media used.

For example, when demonstrating recognition of a sign, advertising on a nationwide television channel or in a famous periodical should be given more weight than regional or local campaigns. High audience or circulation figures will help to establish the reputation of the trade mark. Likewise, sponsoring prestigious sporting or cultural events may be a further indication of intensive promotion. This is because the considerable investment this involves is mainly due to the size or nature of the audience reached.

Example:

Case No	Comment
19/10/2022, T-275/21 , DEVICE OF A CHEQUERBOARD PATTERN (fig.), EU:T:2022:654, § 64	evidence relating to trade mark advertising campaigns in the press, on the radio or on television, as well as excerpts from catalogues and brochures containing images of goods bearing that mark, may constitute indications that the contested mark has acquired distinctive character through use (see 14/12/2017, T-304/16 , BET365, EU:T:2017:912, § 71).

As regards online advertising efforts, they may also be used as evidence by providing data concerning 'paid search' and 'paid social advertising'. These refer to the practice of paying for an advertisement space in search engines or on social media platforms.

For further information on advertising evidence see:

Acquired distinctiveness	Part B, Examination, Section 4, Absolute grounds for refusal, Chapter 4, Acquired distinctiveness through use (Article 7(3) EUTMR), 8.1.2 Market share and 8.1.3 Advertising and turnover expenses
Reputation	Part C, Opposition, Section 5, Trade marks with reputation (Article 8(5) EUTMR), 3.1.3.6 Promotional activities

Proof of use	Part C, Opposition, Section 7, Proof of use, 6.1.2.5 Use in advertising
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4.8.2 Publications

A party may submit publications, including:

- press notes;
- newspapers;
- magazines;
- printed materials;
- extracts from guides, books, encyclopedias, dictionaries or scientific papers.

In EUTM proceedings, the probative value of publications to show the success of the relevant mark depends on whether they are merely promotional or are the result of independent, objective research. If articles appear in prestigious publications with rigorous quality standards or are written by independent professionals, they may have a high probative value.

Case No	Comment
16/12/2010, T-345/08 & T-357/08 , Botolist /Botocyl, confirmed 10/05/2012, C-100/11 P , § 54	The very existence of articles in a scientific publication or the general-interest press constitutes a relevant factor in establishing the reputation of the products marketed under the trade mark BOTOX among the general public, irrespective of the positive or negative content of those articles.

10/03/2011, R 0555/2009-2 , BACI MILANO (fig.) / BACI & ABBRACCI, § 35	The earlier trade mark's reputation on Italy was proved by the copious documentation the opponent submitted. This included, inter alia, an article from Economy revealing that in 2005 the 'BACI & ABBRACCI' trade mark was one of the 15 most counterfeited fashion brands in the world; an article published in Il Tempo on 05/08/2005, in which the 'BACI & ABBRACCI' trade mark is mentioned alongside others – including Dolce & Gabbana, Armani, Lacoste and Puma – as being targeted by counterfeiters; an article published in Fashion on 15/06/2006, in which the trade mark is defined as 'a true market phenomenon'; publicity campaigns from 2004 to 2007, with testimonials from entertainment and sports celebrities; and a market survey conducted by the renowned independent agency Doxa in September 2007, from which it emerges that the trade mark is 'top of mind' in the fashion sector for 0.6 % of the Italian public.
08/07/2020, T-533/19 , sflooring (fig.) / T-flooring, EU:T:2020:323, § 51	The affixing of a trade mark to a magazine, periodical, review, journal or catalogue is, in principle, capable of constituting 'valid use of the sign' as a trade mark for the goods and services designated by that mark if the content of the publications confirms use of the sign for the goods and services it covers (05/02/2020, T-44/19 , TC Touring Club (fig.) / TOURING CLUB ITALIANO et al., EU:T:2020:31, § 67).

Where genuine use is being demonstrated and the scale of use is not the essence, different criteria might apply and even less famous or prestigious publications may be useful. Likewise, in design invalidity proceedings, almost all kinds of publications are a suitable means of proving disclosure of a prior design (see the Design Guidelines, Examination of design invalidity applications, Section 5 The different Grounds for Invalidity, paragraph 5.7.1.2 Establishing the event of disclosure).

4.9 Oral evidence

Oral evidence refers to evidence taken at oral proceedings, such as hearing the oral evidence of parties, witnesses or experts. For more information on oral proceedings,

see the Guidelines [Part A, General rules, Section 2, General principles to be respected in the proceedings, 4 Oral proceedings](#).

Only in exceptional cases will the Office decide to hear oral evidence. This is because oral evidence is not normally necessary for the parties to present their legal and factual arguments effectively. Moreover, the cumbersome nature of the procedure can unjustifiably lengthen proceedings and increase costs significantly (15/12/2022, [R 1613/2019-G](#), Iceland (fig.), where the Office heard witness and expert evidence).

Where the Office decides to hear witnesses or experts, it will bear the costs. However, where the parties request oral evidence, they will bear the costs.

Neither [Article 97 EUTMR](#) and [Article 51 EUTMDR](#) nor Article 64 CDR and Article 42 CDIR impose an obligation on the Office to summon witnesses to oral proceedings where requested by either party (14/06/2021, [T-512/20](#), Protective covers covers for computer hardware, EU:T:2021:359, § 31-34).

Where a party requests oral proceedings, the requester must explain why the oral testimonies would be more apt to attest the facts alleged or why it was not able to provide those testimonies in writing or in any other form (18/01/2018, [T-178/17](#), HYALSTYLE, EU:T:2018:18, § 15-24).

The Office will inform the parties about hearing of a witness or expert before the Office, so they can attend and pose questions to the witness or expert.

The probative value and reliability of the oral evidence given by witnesses and parties can be assessed in broadly the same way as affidavits.

4.10 Commissioning of expert opinions by the Office

[Article 52 EUTMDR](#), [Article 97 EUTMR](#)

Articles 43 and 44 CDIR

The Office does not often commission an expert opinion because it can usually decide matters based on the evidence on file (see as exceptional cases 21/09/2011, [R 1105/2010-5](#), FLUGBÖRSE, where the Office commissioned an expert opinion on the meaning of the word 'Flugbörse' on a certain date in the past, and 25/02/2021, [R 0696/2018-5](#), QUESO Y TORTA DE LA SERENA (fig.) / Torta del Casar et al., where the Office commissioned an expert opinion on the generic character of the term 'Torta'). Moreover, expert opinions may involve substantial costs and lengthen the proceedings.

The commissioning of expert opinions by the Office under [Article 52 EUTMDR](#) and Article 44 CDIR ('commissioned expert opinions') is different from expert opinions that a party may submit on its behalf in proceedings and from experts to be summoned under [Article 51 EUTMDR](#) and Article 43 CDIR (15/12/2022, [R 1613/2019-G](#), Iceland (fig.), where experts were heard as witnesses).

Commissioned expert opinions may be written or oral. If delivered orally, the practice described in [paragraph 4.9 Oral evidence](#) applies.

If a party requests the Office to commission an expert opinion, the Office will assess:

- whether or not to commission an expert opinion;
- who to appoint as expert; and
- what form the opinion should take.

The Office does not maintain a list of experts.

If the Office decides to commission an expert opinion, under [Article 52\(2\) EUTMDR](#) and Article 44(2) CDIR, the invitation to the expert includes:

- a precise description of their task;
- the deadline for submitting their opinion;
- the names of the parties to the proceedings;
- details of any costs the Office will reimburse.

The commissioned expert opinion must be submitted in the language of the proceedings or accompanied by a translation into that language. A copy of the written opinion, and of the translation if needed, must be forwarded to the parties.

The parties can object to a commissioned expert on the grounds of incompetence, a conflict of interest (because the expert was previously involved in the dispute as a representative of one of the parties or in taking a decision at any stage) or because of partiality. If a party objects to the expert, the Office will rule on the objection.

4.11 Inspections in situ carried out by the Office

The Office almost never has to inspect items outside its premises. Only in very exceptional circumstances will the Office carry out an inspection in situ under [Article 51\(1\) EUTMDR](#) and Article 43(1) CDIR, for example at the premises of a party.

If the Office decides to carry out an inspection, it will take an interim decision, stating the relevant facts to be proved, the date, time and place of the inspection.

The date fixed for the inspection must allow the party concerned sufficient time to prepare for it. If the inspection cannot take place for some reason, the proceedings will continue based on the evidence on file.

5 Belated evidence in *inter partes* proceedings

[Article 95\(2\) EUTMR](#), [Article 8\(5\) EUTMDR](#), [Article 10\(7\) EUTMDR](#), [Article 19\(1\) and \(2\) EUTMDR](#)

Article 63(2) CDR

Parties to proceedings must submit their observations within the time limits laid down in the EU trade mark and Community design regulations or within those

established by the Office (see the Guidelines [Part A, General rules, Section 1, Means of communication, time limits, 4 Time limits specified by the Office](#)).

The Office may disregard facts or evidence that are not submitted in due time. The Office has broad discretion in this regard (13/03/2007, [C-29/05 P](#), ARCOL / CAPOL, EU:C:2007:162, § 43; 05/07/2017, [T-306/16](#), Door handles, EU:T:2017:466, § 16). Therefore, there is no guarantee that the Office will take belated facts and evidence into account.

Best practice: if the party knows that it will not be able to submit all its evidence within the time limit set by the Office, it should request an extension of the time limit rather than sending part of the evidence late (see the Guidelines [Part A, General rules, Section 1, Means of communication, time limits, 4.3 Extension of time limits](#)).

Guidance in particular proceedings can be found here:

Opposition proceedings: substantiation	Part C, Opposition, Section 1, Opposition proceedings, 4.2.6 Facts and evidence submitted after the substantiation time limit
Belated proof of use	Part C, Section 1, Opposition proceedings, 5.3.1. Time limit for providing proof of use
Trade mark invalidity and revocation proceedings	Part D, Section 1, Cancellation Proceedings, 2 Applications for Cancellation and 3 Adversarial stage
Design invalidity proceedings	Design Guidelines, Examination of design invalidity applications, Section 2, Introduction – General Principles Applying to Invalidity Proceedings, 2.4 compliance with time limits

The concept of 'belated evidence' requires:

- a time limit to have been set and to have been missed, and;
- the evidence to be submitted after the expiry of this time limit ('late').

Where no time limit was missed, paragraphs [5.1-5.2](#) do not apply.

5.1 Distinction between supplementary and new facts or evidence

If a party provides facts or evidence outside the time limit, a distinction is made between:

- **entirely new facts or evidence**, meaning there is no link to facts and evidence that were provided on time; or

- **supplementary facts or evidence**, meaning the party submitted facts or evidence on time and later supplements them (e.g. to rebut the argument of the other party in inter partes proceedings or to overcome arguments of the Office) 19/01/2022, [T-76/21](#), Pomodoro, EU:T:2022:16, § 40.

The Office does not accept entirely new facts or evidence in **inter partes proceedings**. The acceptance of such belated evidence would render time limits ineffective. There would be no incentive for parties to meet a deadline (13/03/2007, [C-29/05 P](#), ARCOL / CAPOL, EU:C:2007:162, § 48; 19/01/2022, [T-76/21](#), Pomodoro, EU:T:2022:16, § 37).

Best practice: if a time limit has been missed in EUTM inter partes proceedings and entirely new evidence is submitted, the party should consider requesting continuation of proceedings instead ([Part A, General rules, Section 1, Means of communication, time limits, 4.4 Continuation of proceedings](#)).

However, the Office may accept supplementary facts or evidence exercising its power of discretion (see [paragraph 5.2](#)).

Best practice: the party submitting late facts or evidence must provide arguments why such facts or evidence are only supplementary (not entirely new) and may therefore be accepted. It should establish a concrete link by indicating to which previously submitted facts or evidence the supplementary evidence relates to, for example, by providing a table.

To be considered supplementary evidence, the party must have made a serious attempt to provide sufficient evidence for all factors to be proven within the time limit. For example, if a party only refers to its own website as evidence of use of a mark, no serious attempt has been made to provide proof for the time, place and extent of use. Any invoices or other evidence submitted at a later stage will be considered as new evidence (04/05/2017, [T-97/16](#), GEOTEK, EU:T:2017:298, § 29).

Moreover, the facts and evidence submitted within the deadline must cover all relevant factors to be proved for supplementary evidence to be possible. If only some of the factors are covered within the deadline, late evidence that relates to other factors may be considered inadmissible. For example, if the party did not submit any facts or evidence on time to prove the **place of use** and did not argue anything in that regard, late evidence provided to show the place of use will be treated as entirely new evidence.

The fact that the number of items of evidence submitted beyond the time limit is considerably greater than the items of evidence submitted in due time does not necessarily make the late evidence inadmissible (19/01/2022, [T-76/21](#), Pomodoro, EU:T:2022:16, § 44).

5.2 Discretionary power

If the evidence is considered supplementary evidence in *inter partes* proceedings, the Office must exercise its discretionary power and decide whether the evidence is to be taken into account.

In doing so, the Office must consider:

- the stage of the proceedings when the belated evidence was submitted;
- if the late evidence is at first sight relevant, insofar as it appears to have an impact on the assessment and outcome of the case;
- whether there are valid reasons for the late submission; and
- whether the surrounding circumstances would prevent the late facts and evidence being considered.

These factors are independent.

Examples:

Additional facts or evidence are more likely to be accepted if they can be relevant to the outcome of the case, and are submitted at an early stage of the proceedings with a justification for their submission at that stage. However, the later the stage of proceedings, the stronger the reason must be for late submission or the relevance of the evidence.

If the circumstances of the case lead to the conclusion that a party is using delaying tactics by submitting evidence in parts with the intention of prolonging the proceedings, the late evidence is unlikely to be admitted.

The difficulties involved in obtaining the evidence are not, as such, a valid reason for its belated submission.

The Office must **state reasons in its decision** showing that it exercised discretionary power (05/07/2017, [T-306/16](#), Door handles, EU:T:2017:466, § 18). It must:

- state why the late facts and evidence are admissible or not;
- set out the factors it took into account; and
- balance the interests at stake.